Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. .

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE J. FOXX,
Petitioner,

v.

RICHARD DANZIG,
Secretary, Dept. of the Navy,
Respondent.

On Petition for Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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56pp

QUESTION PRESENTED

WHETHER SUMMARY JUDGMENT AND CASE DISMISSAL IS PROPER IN A TITLE VII RACE DISCRIMINATION CASE WHEN TWO DIFFERENT JUDICIARIES HAVE DIFFERING OPINIONS REGARDING DISMISSAL (One Court's position was Dismissal is Denied on five of six counts in the instant); CAN MATERIAL EVIDENCE OF PROSCRIBED FRAUDLENT BEHAVIOR BY THE RESPONDENT INVOLVING THE INTENTIONAL INHIBITION OF EXONERATING DISPARATE AND DISCRIMINATORY INFORMATION OF PROHIBITED PERSONAL PRACTICES BY A GOVERNMENTAL AGENCY OVER AN EXTENDED PERIOD TOLL A RES JUDICATA CLAIM; SHOULD THE AGENCY COMMITTING SEPARATE AND SUBSEQUENT WRONGDOINGS RESULTING IN MORE THAN $14,000 IN PERSONAL PROPERTY DAMAGES BE HELD ACCOUNTABLE; AND WHETHER THE DISTRICT COURT SUBSTITUTING HIS OWN JUDGMENT DENIED THE PETITIONER DUE PROCESS AND EQUAL PROTECTION FROM GAINING ACCESS TO A TRIER OF THE FACTS (a demanded jury)?

FOXX v. DANZIG

CERTIFICATE OF INTERESTED PERSONS AND CORPORATION DISCLOSURE STATEMENT

The following have an interest in the outcome of this case:

Honorable Gerald Bruce Lee, District Judge

George J. Foxx, Petitioner

Richard Danzig, Respondent

Arthur Erwin Peabody, Jr., Esq.,
Counsel for Respondent

Richard Parker, Esq.,
Counsel for Respondent

Gary K. Springstead, Esq.,
Counsel for Respondent

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OPINION BELOW

On August 28, 2000 and May 3, 2000, respectively, the United States Court of Appeals for the Fourth Circuit, in critical curt decisions affirmed the District Court's Order granting Respondent summary judgment and dismissing Petitioner's discrimination case over another Court's decision Denying Dismissal. Copies of the decisions are enclosed in the Appendix. On September 5, 2000, a mandate was issued regarding the May 3, 2000 judgment.

JURISDICTIONAL STATEMENT

This Petition for Writ of Certiorari is made pursuant to 28 U.S.C. § 1254(1). Jurisdiction for the appeal was pursuant to 28 U.S.C. § 1291, appeal from a final judgment of the district court. Jurisdiction for the original proceeding was pursuant to the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq., employment discrimi-nation, separate and subsequent wrongdoings, retaliation, and violations of due process before, during, and after the wrongful employment dismissal.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involved race discrimination and retaliation in employment. In addition, fraudulent

behavior, inhibition of exonerating evidence, and prohibited personnel practices not consistent with "fairness." Obstruction of justice, and violations of civil, due process, and procedural rights based upon Title VII, The Civil Rights Act of 1964, as amended, and the provisions guaranteed by the U.S. Constitution.

STATEMENT OF THE CASE

In May of 1998, Petitioner timely filed a six-count instant in District Court, Middle District of Florida, before Elizabeth A. Kovachevich, Chief Judge, after receiving a Right to Sue Letter from the EEOC (see Foxx v. Dalton, 46 F. Supp. 2d. 1268). Counts I-VI of Petitioner's complaint alleged that the Respondent had been ***"deceitful"*** toward the Petitioner in the dismissal of Petitioner from the position held in Panama. Though, several points in the complaint dealt with issues that had been decided previously (res judicata), there were new issues that had not been addressed, ***plus*** "separate and subsequent" wrongdoings that Respondent had directed toward the Petitioner, and that such ***fraudulent*** behavior should tolled the Respondent's res judicata claims.

In the separate and subsequent wrongdoings, Respondent caused and was responsible for more than $14,000 worth of damages of Petitioner's personal household belongings that had been held by

the Respondent unlawfully for more than 18 months after firing the Petitioner. The Respondent even exposed Petitioner's personal effects to the elements, and exposed Petitioner's personal under-garments needlessly violating Petitioner's privacy and civil rights; issues than had not been at issue previously.

Petitioner repeatedly introduced "new and subsequent evidence" that Respondent had engaged in obstruction of justice, specifically, being deceitful to lawful authorities, inhibiting exonerating evidence that equated to ***"unfair and motivated disparity and discriminatory treatment"*** toward the Petitioner over an extended period of years (1989 to present). The conduct of the Respondent was so egregious, fraudulent, unreasonable, and harmful error, that it violated the civil, due process, and procedural rights of the Petitioner. However, in legal tactics the Respondent kept claiming "res judicata" that found favor with the preceding courts.

Petitioner vigorously disagreed, as such "deceit" should be tolled. Petitioner's position is that the separate and subsequent wrongdoings were created out of the same nucleus, yet separate, meaning the parties' employment scenario. But the Respondent never had carte blanche to discriminate, abuse, deceive, obstruct the principles of lawfulness and decency and not be held accountable, being "above the law," before, during, and after the firing of

Petitioner.

Petitioner, was an employee of the Respondent for 18 years, and was fired for an alleged $27.00 travel voucher error. Petitioner contended that there was no intent to defraud the Respondent, as there was no loss incurred. Further, there had been ***four*** Caucasians who worked for the Navy who were similarly situated and were treated differently. And corroboration by witnesses in the U.S. Southern Command agency's personnel office, namely the personnel officers, who had direct input into the personnel decisions that resulted in "unfair treatment of Petitioner" versus the similarly situated ***"five"*** Caucasians.

The firing of the Petitioner had equated to unfair and excessive disciplinary action. Whereas, ***"five"*** similarly situated Caucasians were treated significantly different (*see Mrs. Mills' statement and declaration in Appendix, A6*). Petitioner had been a model employee, holding the position of supervisory computer programmer analyst, Information Systems Division Director and Command Automated Data Processing Security Officer, NM-11, for the U.S. Naval Station Panama Canal. Petitioner, a Vietnam-era veteran, had accumulated over 60 career awards and commendations (10 achieved at the agency), and had no disciplinary action prior to the firing.

Each time issues were presented the Respondent

claimed res judicata, even though the Respondent's position contained false and fraudulent elements motivated by discrimination. Petitioner argued that the ***"new and subsequent evidence"*** *(while corroborated)* was clear and concise demonstrating unfair, discriminatory and disparate treatment the Petitioner suffered, yet, the lower court denied Petitioner a trial before a "demanded jury." The denial was done even though the Respondent's fraudulent behavior should have been tolled.

In spite of one Court stating ***"Dismissal Denied"*** on five of six counts, and another Court set a trial date, the third Court induced confusion and conflict by granting summary judgment and dismissal. Petitioner feeis the last District Court, Foxx v. Danzig, C.A. 99-558-A, erroneously substituted his own judgment for that of a "demanded jury."

The Fourth Circuit erred by agreeing with the District Court, despite disputed evidence *"weighty enough"* for warranting a remand "back to the trial calendar set by the preceding judge. The nucleus of this case has expanded for more than 11 years (May 1989 – present), before more than 60 various decision-makers (judges), and 20 venues, including this Honorable Court for the second time.

Throughout this round of litigation, the issues of failing to recognize the separate and subsequent

wrongdoings, violations of civil, due process, and procedural rights, obstruction of justice, inhibition and fraudulent behavior, appeared to escape the eyes of the reviewers including the Fourth Circuit. This is evident by virtue of their rendered curt "unpublished" decisions. The issues in this case are crucial to the "fundamental fairness" in the workplace, while eliminating psychological trauma, abating racial inequality, and removing prejudicial favoritism while engaging in prohibited personnel practices. Moreover, "a resolve for an unfair conflict between different judiciaries is appropriate."

In sum, while in the Middle District of Florida, the Respondent requested dismissal of the case, or alternatively, transfer venue ***"back"*** to the Eastern District of Virginia, even though the parties had an agreement ***not*** to use that court as a future forum. Chief Judge Kovachevich ruled in a **Standard of Review** count I (dismissed, res judicata), but counts II through VI **"Dismissal Denied"** based on the principles of separate and subsequent wrongdoings and violations toward the Petitioner. However, the Court interpreted the parties' agreement to mean that the Petitioner **"was not barred"** from returning to the Eastern District of Virginia Court. The Court transferred the case over "repeated objections."

Once in the Eastern District of Virginia, the case was originally assigned to Claude Hilton, District

Judge, who had set a trial date for October 12, 1999, and urged settlement between the parties. However, in the eleventh hour before trial, Gerald Bruce Lee, District Judge, intervened and granted Respondent's Motion for Summary Judgment and Dismissal over "repeated objections," creating confusion and conflict. No reconsideration was granted when requested.

The case was appealed to the U.S. Court of Appeals for the Fourth Circuit, the case was affirmed. The Petitioner requested for Rehearing and Rehearing En Banc, but was denied, bring this case before this Honorable U.S. Supreme Court.

REASON FOR GRANTING THE WRIT OF CERTIORARI

The nucleus of this case spans more than 11 years old. The "fairest" way to conclude this case is to remand this case back to the District Court with instructions to place this case "back on the trial docket." It is clear from the evidence that Petitioner, a Black Vietnam-era veteran with more than 18 years of "vested" dedicated service at the time of firing was subjected to racial animus, unfair personnel practices, "harmful error" in the firing. Petitioner was the "victim" of motivated discrimination regarding his rights and procedural obligations, and disparity in the workplace despite the proscribed provisions of the

Civil Service Reform Act, EEO rules and regulations, and the provisions guaranteed by the U.S. Constitution. Further, Petitioner's firing was so racially motivated that such Respondent's behavior violated the ***"principles of decency."***

The conflict between the district courts caused confusion regarding the principles of EEO rules and regulations and evidence containing Respondent's discriminatory & fraudulent behavior, inhibition, and obstruction, thus added to the injurious condition already suffered by the Petitioner, in spite of "clear and convincing and corroborating evidence."

ARGUMENT: IT WAS REVERSIBLE ERROR TO GRANT A SUMMARY JUDGMENT AND DISMISSAL OF PETITIONER'S RACE DISCRIMINATION AND DUE PROCESS CASE:

The District Court erred when it granted Respondent's Motion for Summary Judgment and Dismissal. This Honorable Court should "remand with instructions" to place Petitioner's case back on the trial docket to resolve the multiple confusion and conflicts created.

Summary judgment is proper when there are no genuine issues as to and material facts and the moving party is entitled to judgment as a matter of

law, pursuant to Rule 56(c), Federal Rules of Civil Procedure. Summary judgment and dismissal was not proper in the District Court because the material facts were in dispute. Further, Petitioner had introduced evidence that Respondent had been allegedly ***"deceitful"*** more than 21 times. In addition, the Respondent ***was the party who requested*** the change (not Petitioner) in venue "back to the Virginia Court" despite the parties' agreement not to do so. Such a shrewd tactic was unethical and then to use such shrewdness against the Petitioner equated to bamboozling, while reaching the ***"superlative of opprobrium."*** Venue was proper in the Middle District as the Respondent is represented there, too.

The Respondent's disposition was ***"other than good faith"*** the required necessary to prove liability. The "new and subsequent evidence was proof of reckless conduct" and discriminatory intent, plus obstruction of justice, and directly perpetrated fraud upon the courts and judicial process sufficient enough to warrant a remand back to the trial docket. Respondent clearly acted as a ***"scienter"*** in the change of venue request.

It is evident by and through the Middle District Court's ruling that ***had not*** the venue been change, a trial would have convened. It was clear that the Court

stated "Dismissal Denied" on five of the six counts, and the other count had been ruled res judicata based on fraudulent and inhibition of exonerating evidence worthy of being tolled. This was malfeasance & legal trickery while breaching of the parties' agreement. What honor was there if the Respondent was not going to abide by the terms of the agreement ***not to return*** to the Eastern District, then use the ***"knowingly unethical guise"*** against the Petitioner? This amounted to "first class opprobrium" and should not be permitted to stand. Based on the parties' agreement, venue was proper in the Middle District.

Moreover, prior to the granting of Respondent's summary judgment motion, Petitioner had submitted **"two"** dispositive motions. The Respondent "failed to respond repeatedly." The petitioner's motions were disregarded despite the repeated default of the Respondent. This notion was "inequitable," thereby failing to afford the Petitioner equal protection and equal access to the same law that failed the Petitioner even after repeated objections.

In pointing out the Respondent's fraudulent behavior, Petitioner pointed out that the inhibition and obstruction of exonerating evidence should not have been allowed. In Cook v. Avien, 573 F.2d 685, 695 (1st Cir. 1978) Lay, C.J., Eighth Circuit, sitting by designation) emphasized that:

> "On defendants' motion for summary judgment, plaintiff must show that there is a reasonable factual dispute regarding when they should have discovered the fraud, sufficient to preclude summary judgment for defendant," FRCP 56(c); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986). "Plaintiff should be able to proceed with their theory of equitable tolling if there is a reasonable factual dispute as to whether fraud existed..."

Petitioner had maintained that Respondent had engaged in fraudulent behavior and unfairness from the onset. There is clear evidence corroborated via witnesses' account and declaration of "provisions of deceit" and should be allowed to manifest justice before a trier of the facts (a demanded jury).

The separate and subsequent wrongdoings are governed by Blair v. Greenville, 649 F.2d 365, 368 (5th Cir. 1981) (citing J.W. Moore & T.S. Currier, Moore's Federal Practice 621, et seq. (1980). ***"A subsequent wrong constitutes a new cause of action."*** The unlawful holding of Petitioner's household goods for more than 18 months and causing more than $14,000 worth of damages clearly was ***wrong*** and had nothing to do with promoting the efficiency in the service or the firing. In fact, such wrongful actions proved ***"motivated"*** racial intent

and animus toward the Petitioner. The violations of Petitioner's personal privacy and household goods were "separate and subsequent wrongdoings."

The inhibition of exonerating evidence that ***"four"*** Caucasians (S. Danielson, M. Birge, Commander R.A. Kelly, and W. Wing) had committed more egregious offenses than Petitioner, and to treat the Caucasians very differently from the Petitioner goes to the core that Petitioner was treated differently. The alleged $27 error reason for the firing was a ***"motivated fake"*** corroborating Petitioner's position (see principles of discrimination as quoted in Reeves v. Sanderson Plumbing Products, Inc., (99-536) 197 F.3d 668, reversed (2000).

Petitioner, a Black Vietnam-era veteran, proved a prima facie case of discrimination, as being in a protected class, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-253 (1981), and meeting the requirements as outlined in McDonnell Douglas v. Green, 411 U.S. 792 (1973). The supposedly legitimate reason turned out to be a ***"false and a fake."*** If the reason was so legitimate, then every person committing a similar offense should have been fired after Petitioner? That was simply not the case!

A Caucasian (H. Von Hollen) before Petitioner received a ***reprimand***, Petitioner was ***fired***, and the four Navy Caucasians following Petitioner were treated very differently, ***ranging from no punishment to very little.*** Even though the "five" Caucasians committed offenses including: travel fraud, theft of government property of more than $2,000, waste over $50,000, and providing false and perjurious statements to the courts and lawful authorities repeatedly obstructing justice, yet, they were treated unlike Petitioner. Clearly, the given "so called" legitimate reason was false, double standard, workplace favoritism, and racial animus. Importantly, *all employees worked jointly for the U.S. Southern Command and knew each other on a first name basis.* This total evidence was hidden and withheld by Respondent for years until clearly disclosed in a separate matter before the Merit Systems Protection Board (MSPB).

The provisions and nucleus of this case has continued to be a spin-off to other cases. For example, in Foxx v. Office of Personnel Management, AT-0731-00-0647-I-1, (2000), the evidence of "unfairness" was clearly demonstrated through Mrs. Mills' statement and declaration *(see Appendix, A6)* corroborating that the Respondent maintained a foundation for discrimination while

engaging in unfair workplace practices. Petitioner's evidence was sufficient enough and should not have had to be over and beyond extra-ordinary (see Reeves v. Sanderson [I, II] for a "demand jury" to decide.

To support Petitioner's claim of motivated animus, (1) Petitioner was greeted with racial animus when reporting for duty, i.e., "Oh shit!" "We had just bet if you had blue eyes or a beard!" "Guess what our new supervisor is Black!" (2) After only a few weeks of reporting to work, Respondent's personnel sent Petitioner racial and hatred material on multiple occasions that were considered ***"offensive and racist jokes"*** to wit: "Farmer's Dayvorce" (inferring Nigger-Nagger), "If you are Unhappy" and "Why Worry" (threats). (3) And when Petitioner complained three times, Respondent told Petitioner to ignore such behavior rather than take corrective actions. This was wrong and erroneous for the District Court and Fourth Circuit to disregard this clear and convincing evidence, especially when the Respondent does not deny the egregious actions.

Thereafter, (4) Petitioner having to bring his own chair to the Christmas Day, 1989, dinner held at his supervisor's quarters because the Caucasian supervisor ***"did not"*** want Black Petitioner to sit on his furniture, where ample sitting were available. (5)

Other Caucasian males who were invited did not have to bring their own chair. The Caucasian supervisor's guests laughed at Petitioner standing at the door with his chair in hand.

In addition, (6) Petitioner was threatened to wit: "leave by sundown or be arrested" and (7) Petitioner's life was placed in danger and in Harm's Way recklessly during war conditions (Operation Just Cause) in Panama. And (8) the denying Petitioner of his already earned "Operation Just Cause" award was clearly enough evidence for a reasonable jury to decide whether the reason was legitimate or discriminatory. The District Court ***"abusively substituted"*** his judgment for that of a "competent demanded jury" and erred. This was reversible error!

Lastly, in the original summary judgment in USDC, Eastern District, VA, Foxx v. Garrett, IV, C.A. No. 92-297-A, before James Cacheris, District Judge, the *transcript* clearly exhibited the position of the Respondent. Now that the inhibited evidence was exposed, the Respondent cannot hide from this corroborated evidence of motivated racial animus.

Before the Honorable James C. Cacheris, Presiding United States District Judge, 2 p.m. on

August 28, 1992.

Page 3, lines 6-11, The Court: "He says that he was discriminated against, like for example at the party where he was the only person that was told to bring a chair, that when he was originally employed, they all seemed surprised that they had a black supervisor. That's his allegations as well as his affidavit says that."

Page 3, lines 12-19, Mr. Parker: "Well, Your Honor, the only affidavit that says that is his; therefore, self serving. Two, the three instances of conduct which are discussed in those affidavits: One, Lieutenant Commander Purdy coming to the airport and allegedly saying, "Oh shit," and gesturing; and two, being asked to bring a chair to Lieutenant Commander Purdy's party; and, three two female employees, Caucasian" --

Page 4, lines 2-8, Mr. Parker: "Assuming in the first instance that Commander Purdy made gestures at the airport and said "Oh shit," what evidence is that he did that out of a racially discriminatory animus besides plaintiff's interpretation of it. What evidence

is there that he asked him to bring a chair to his party, there is an innocent explanation which is offered."

Page 4, lines 11-14, The Court: "Well let me ask you, if you're the only black person that comes to a Christmas party, you're the only guy that's told to bring a chair, I mean, isn't that some evidence of racial discrimination?"

Page 4, lines 15-21, Mr. Parker: "It's evidence of the fact that, as Lieutenant Commander Purdy says, the chairs in his house were weak, he fell through them because he is the same size as Mr. Foxx, and asked Mr. Foxx to bring a chair so he wouldn't fall through. You could choose to infer that Commander Purdy was racially discriminatory, but let me tell you why that doesn't make any difference anyway."

Page 5, lines 1-10, Mr. Parker: "He's still not qualified, he still hasn't shown that any other similarly situated person was treated differently. The only person he has pointed to is Harvey Von Hollen who was not a member of the Navy, member of the Air Force, he did not commit travel fraud, and his

case was not acted upon by the two people who acted upon plaintiff's case. So what can the court infer from some disparate Air Force officials actions in an unrelated case? It says nothing about the Navy officials who acted on his case."

Page 5, lines 17-25, Page 6, lines 1-3, Mr. Parker: "The burden on him is to prove that what we did was a pretext. The person who removed him is Commander Kelly. Those two instances of conduct, the chair and the Christmas party, do not involve Commander Kelly. They say nothing about Commander Kelly because they don't involve him. There's no evidence before the Court to rebut our contention that Commander Kelly acted because plaintiff committed fraud. Nothing he has said with respect to the chair incident or airport involved Commander Kelly. He has failed to bring you any evidence involving Commander Kelly."

With respect for the latter sentence in the cited preceding *transcript*, Commander Kelly is ***"one"*** of the ***four*** Navy Caucasian similarly situated individuals of the "five" who committed *fraud and theft of government property* (as ***contrasted*** in Mrs.

Mills' statement, *see Appendix, A6, No. 30*). All similarly situated employees worked in the U.S. Southern Command.

This case should be remanded with instructions:

AS TO COUNT I

The inhibition of exonerating evidence motivated and perpetrated by "fraudulent and unethical behavior" by the Respondent is sufficient to toll a res judicata claim; therefore, this count should be reinstated. No doubt, if the evidence were not inhibited from the onset as corroborated, the outcome would have been different.

AS TO COUNTS II THROUGH VI

The different judiciaries have produced confusion and conflict where clearly there was race discrimination present. The issues were not ripe for the granted summary judgment and dismissal. This case was filled with enough weighty evidence for a trier of the facts, and should be remanded. Five of the six counts were significant. The new evidence was clear that the Respondent was motivated and violated the proscribed laws. Certainly, the $14,000

worth of personal property damages was not warranted and violated Petitioner's civil, due process, and procedural rights while depriving Petitioner of his vested property, Sipes v. United States, 744 F.2d 1418. As a public employee facing discharge, Petitioner was entitled to the safeguards and equal protection of the law, including his personal and vested properties. Petitioner was the ***"victim"*** of ***"motivated animus and unfair personnel management practices."*** Therefore, counts II through VI should be reinstated.

Finally, as the non-moving party, Petitioner did not receive fair treatment. And as far as the change of venue, Petitioner again was the victim of ***"obstruction of justice, deceit and guise."*** According to the parties' agreement, venue was proper in the Middle District of Florida.

CONCLUSION

According to the ***"doctrine of fairness"*** Petitioner was similarly situated, yet treated differently. All employees in the Federal sector that are similarly situated should be treated fairly because they are entitled to fair and equitable

treatment under the law. It was just that the Respondent excluded Petitioner.

Discrimination is wrong! 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq. As amended 42 U.S.C.A. § 2000e et seq. ***"Justice is supposed to be blind, her daughter the law, ought to at least be color blind,"*** and throughout this lengthy litigation justice has clearly been applied unfairly.

Therefore, this Honorable Court should right a very serious wrong and grant the Writ of Certiorari. And ultimately reverse and remand with instructions to place this case back on the trial docket in the Middle District of Florida, or other remedy that would promote fairness and justice in the case that is long overdue, and overturn the ***"manifest injustice"*** rendered.

Respectfully Submitted,

/s/_____
George J. Foxx

No

IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE J. FOXX,

Petitioner,

v.

RICHARD DANZIG,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

APPENDIX FOR WRIT OF CERTIORARI

GEORGE J. FOXX
P.O. Box 4173
Tampa, FL 33677

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 5, 2000

No. 99-2560
CA-99-558-A

Foxx v. Dept of Navy

MANDATE

The judgment of this Court dated 5/3/00 takes effect today.

PATRICIA S. CONNOR
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 28, 2000

No. 99-2560
CA-99-558-A

GEORGE J. FOXX

Plaintiff – Appellant

v.

RICHARD DANZIG, SECRETARY OF THE NAVY

Defendant – Appellee

On Petition for Rehearing and Rehearing En Banc

The Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court

/s/ Patricia S. Connor
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-2560

GEORGE J. FOXX,

Plaintiff-Appellant,

versus

RICHARD DANZIG, Secretary, U. S. Navy,

Defendant – Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge.

Submitted: April 27, 2000 Decided: May 3, 2000

Before NIEMEYER AND MOTZ, Circuit Judges, and Butzner, senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

George J. Foxx, Appellant Pro Se. Richard Parker, Arthur Erwin Peabody, Jr., Gary Springstead, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this Circuit. See Local Rule 36(c).

PER CURIAM:

George J. Foxx appeals the district court's orders granting summary judgment to the Defendant in this employment discrimination action and denying his motion filed under Fed. R. Civ. P. 59(e). We have reviewed the record and the district court's opinions and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Foxx v. Danzig, No. CA-99-558-A (E.D. VA. Oct. 1 & Nov. 9, 1999). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Although the district court's orders are marked as "filed" on September 28 and November 5, 1999, the district court's records show that the orders were entered on the docket sheet on October 1 and November 9, 1999, respectively. Pursuant to Fed. R. Civ. P. 58 and 79(a), we consider the date the orders were entered as the effective date of the district court's decision. See Wilson v. Murray, 806 F.2d 1232, 1234-35 (4th Cir. 1986).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GEORGE J. FOXX,

Plaintiff,

v. Civil Action No. 99-558-A

RICHARD H. DANZIG, Secretary,
United States Navy,

Defendant.

ORDER

THIS MATTER is before the Court on Plaintiff's Motion for Reconsideration of this Court's September 28, 1999 Order granted Defendant's present motion and supporting documentation, this Court finds that Plaintiff presents (1) no changes in controlling law, (2) no new evidence or authority, and (3) no errors of law that would persuade the Court to overrule its September 28,1999 Order. Therefore, it is hereby

ORDERED that Plaintiff's Motion for Reconsideration is DENIED.

Plaintiff may appeal this Order pursuant to Title II of the Federal Rules of Appellate Procedure. See, e.g., FED. R. APP. P. 3-4.

The Clerk is directed to forward a copy of this Order to counsel of record.

Entered this 5th day of November, 1999.

/s/_____
Gerald Bruce Lee
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GEORGE J. FOXX,

Plaintiff,

Civil Action No. 99-558-A

RICHARD H. DANZIG, Secretary,
United States Navy,

Defendant.

ORDER

THIS MATTER is before the Court on Defendant's Motion to Dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure (FRCP) 12(b)(6) or, in the alternative, Defendant's Motion for Summary Judgment pursuant to FRCP 56. For the reasons stated below, it is hereby

ORDERED that Defendant's Motion to Dismiss and Defendant's Motion for Summary Judgment are GRANTED.

1. In considering a FRCP 12(b)(6) Motion to Dismiss, the factual allegations in the complaint are presumed to be true, all reasonable inferences are made in favor of the non-moving party, and a count should be dismissed only where it appears beyond a reasonable doubt that recovery would be impossible under any set of facts that could be proven. *See Gasner v. County of Dinwiddle*, 162 F.R.D. 280, 281 (E.D. Va. 1995).

2. The Court should not accept as true, however, allegations that are completely unsupported and conclusory. *See Labram v. Havel*, 43 F.3d 918 (4th Cir. 1995).

3. Under FRCP 56(c), the Court should grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *See* FED. R. Civ. P. 56.

4. Once a motion for summary judgment is properly made and supported, the opposing party had the burden of showing that a genuine dispute exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

5. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for

summary judgment; the requirement is that there is no genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477, U.S. 242, 248 (1986).

6. A party opposing summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue. *See id.*

7. As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *See id.*

8. As a precursor to the Court's analysis in granting Defendant's motions, the Court wishes to acknowledge, with admiration, the amount of time, energy, and effort that Plaintiff has expended, as a *pro se* litigant, in pursuing past and present claims emanating from his employment with the Department of the Navy. Nonetheless, the Court must decide the aforementioned motions on the facts and law, as presented in the record.

9. Count I of the present complaint was dismissed by the United States District Court for the Middle District of Florida. *See Foxx v. Dalton*, 46 F. Supp.2d 1268 (M.D. Fla. 1999).

10. Counts II through V of Plaintiff's present complaint are, in essence, criticisms, by Plaintiff, of the process by which his complaint alleging new evidence was addressed by the agency office or the Equal Employment Opportunity Commission (EEOC) itself.

11. Allegations of mishandling of an agency employee's complaint by an agency or the EEOC do not create a cause of action under Title VII or any other federal statute. *See Adams v. United States EEOC*, 932 F. Supp. 660, 664-65 (E.D. Pa. 1996).

12. The availability of an adequate remedy at law, namely a Title VII lawsuit, preclude judicial review of agency decisions or decisions of the EEOC. *See Washington Legal Foundation v. Alexander*, 984 F.2d 483, 486 (D.C. Cir. 1993).

13. Furthermore, based on the record, it appears that Plaintiff did indeed receive a prior and full investigation of his allegation that "new evidence" supports his claim of racial discrimination.

14. Regarding Count VI, the Fourth Circuit Court of Appeals, in 1993, settled the issue of racial discrimination inherent in Plaintiff's

allegations. *See Foxx v. Garrett*, No. 92-2276, 1993 WL 336095, at *1 (4th Cir. 1993). Thus, the substance of the allegedly "new" claim is the same as Plaintiff's adjudicated 1990 claim.

15. Under the doctrine of res judicata, a judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. *See Cromwell v County of Sac*, 94 U.S. 351, 352 (1876). The doctrine requires three essential elements: (1) a final judgment on the merits in an earlier suit; (2) identity of the cause of action in both the earlier and the later suit; and (3) identity of the parties or their privies in the two suits. *See Nash County Bd. Of Education v. Biltmore Co.*, 640 F.2d 484, 486 (4th Cir. 1981).

16. Additionally, res judicata prevents parties from relitigating issues that were raised or could have been raised in previous litigation. *See Federated Dept. Stores v. Moitie*, 452 U.S. 394, 398 (1981).
17. Since the 1990 claim involved a judgment on the merits, essentially the same cause of action, and identical parties, res judicata bars the adjudication of Count VI. *See Nash City*

Bd. Of Education, 640 F.2d at 486; *see also Foxx v. Garrett*, No. 92-2276, 1993 WL 336095, at *1 (4th Cir. 1993). For the reasons stated above, Defendant's Motion to Dismiss and Motion for Summary Judgment are granted. The complaint is hereby dismissed with prejudice.

The Clerk is directed to forward a copy of this Order to counsel of record.

Entered this 28th day of September, 1999.

/s/
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
9/27/99

MERIT SYSTEMS PROTECTION BOARD
401 West Peachtree Street NW, 10th Floor
Atlanta, GA 30308-3519

GEORGE J. FOXX

vs. No. AT-0731-00-0647-I-1

U.S. OFFICE OF PERSONNEL
MANAGEMENT & E.P.A.
_____/

WITNESS STATEMENT AND DECLARATION

Name ***Elsie L. Mills***

Tel. ***(937) 233-4501/233-3739***

2. Address ***1540 Hochwalt Ave., Dayton, Ohio 45408-1842***

3. What was your official occupation while you were in Panama? ***I was selected for the position of Chief, Affirmative Employment & Classification. I was temporarily selected for the Civilian Personnel Officer for approximately three months.***

4. Did you know George J. Foxx? ***Yes***

5. Did you know Harvey Von Hollen? ***Yes – His supervisor during my temporary promotion and his co-worker the rest of the time.***

6. Did you know R.A. Kelly? ***Yes – Attended Navy staff meetings as the AF representative and he was there wit other Navy staff employees.***

7. Did you know William "Bill" Wing? ***Yes – Financial/Budget Officer for Navy.***

8. Did you know Charles Berg? ***Yes – Chief, Manpower and my counterpart regarding U.S. Navy civilian matters.***

9. Did you know C. Mike Birge? ***Slightly – I mostly dealt with a supervisor under him.***

10. Did you know S. Comer? ***Yes – Commander, U.S. Naval Station.***

11. At the time of your official duty in Panama, did the above named individuals work at the same agency or interagency under the U.S. Southern Command? ***Yes.***

12. In knowing the above individuals while you worked in Panama, did you have official contact (direct/indirect) with them in your official capacity? ***Yes***

13. In reference to Mr. Foxx, did you in your official capacity ever observe any unlawful treatment or unfair personnel management practices that was prohibited by law (including discrimination, disparate treatment, threat or reprisal, or unfair/inequitable treatment)? ***Yes – Initially Mr. Foxx was given a 30-day Notice of Proposed Removal. Before the 30 days was over he was told he had to be off Rodman Naval Station before sundown or else. He wasn't given travel orders to ship his HHG's or truck, and it took 18 months for him to receive his HHG's. Furthermore, he wasn't given any pay due him or funds for travel expense. The JTR, Part II says "in "order for the Government to pay return transportation of civilians to CONUS he/she must remain in the overseas area for one year. Mr. Foxx was less than two weeks of meeting that requirement. Had he been given the full 30-day notice of Proposed removal, he would have met the one-year assignment period***

required for Government paid return travel expense. Other Navy employees were charged with various offenses and none were fired. Harvey Von Hollen and AF employee and my co-worker was charged with travel fraud and was given a reprimand. CONCLUSION: Two employees charged with travel fraud, one employee (Mr. Foxx) was fired and the other employee (Mr. Von Hollen) was given an Official Reprimand. Mr. Foxx was even allowed to serve his 30-day notice period. He was threatened (told to leave by sundown or else) and was allowed to receive money owed him/and lump sum Annual Leave payment. Where is the equal/fair treatment of all employees?

14. In reference to Mr. Von Hollen, do you have any knowledge directly or indirectly regarding any alleged misconduct? ***Yes.***

15. Did you personally intervene on Mr. Von Hollen's behalf? ***Yes – I wrote a letter on his behalf and met with the AF IG Team regarding his travel fraud case. I recommended that he be allowed to remain in his position and he was then given an Official Reprimand.***

16. Did you personally intervene on Mr. Foxx's behalf? ***Yes – I met with Charles Berg, Chief Manpower and Navy's spokesperson & requested that Mr. Foxx be allowed to stay for the 30-day notice period, so he would meet the one-year required for return travel at Government expense. Instead it was leave or else.***

17. In reference to Mr. Foxx and Mr. Von Hollen, in your official capacity, were they similarly situated? ***Yes – They were both NM-11s, one worked for the Air Force and the other worked for the Navy. However, they were both serviced by the Civilian Personnel Office, Howard AFB, Panama under the jurisdiction of the U.S. Southern Command.***

18. Were they treated differently regarding personnel management practices? ***Yes.***

19. Were you ever inquired upon from the offices of any O.P.M. or E.P.A. regarding any prohibited employment practices or any investigation regarding Mr. Foxx? ***No.***

20. Did any member of the offices of O.P.M. or E.P.A. contact you at all between July 28, 1999 through June 01, 2000 regarding an investigation about Mr. Foxx? ***No.***

21. Would this be a harmful error to say you were contacted by O.P.M. or E.P.A. investigators, when in fact you were not? ***Yes.***

22. If so contacted, what would you have told investigators about official knowledge regarding the treatment of Mr. Foxx? ***Mr. Foxx was not allowed to remain in Panama during the 30-day notice period. He was told to leave by sundown or else. Was not given any money due him and basically stripped of all entitlements. How can an agency have two employees charged with the same offense and one fired and the other given a reprimand. Mr. Von Hollen remained employed and was promoted and ten years later Mr. Foxx is still trying to be reinstated. How just was that when all employees (Federal) are supposed to be governed by the same regulations and rules and treated so differently. Navy kept Mr. Foxx's HHGs for 18 months, broken open sealed shipping containers and damaged Mr. Foxx's personal effects, costing the Government thousands of dollars. His Official Personnel Folder was tampered with/and or destroyed. Yet no one has questioned Navy's wrongdoing and involvement.***

23. If your input and knowledge were omitted by O.P.M. and E.P.A. investigators, would such omission render a suitability determination faulty from the lack of information in your opinion? ***Yes.***

24. Was there anything unfair, immoral, disparate, reprisal regarding the treatment of Mr. Foxx after leaving the agency regarding travel or the handling of his household goods or personal property that was not warranted as part of his firing? ***Yes - It –as unfair to run him out of Panama without funds/transportation to the airport. During this time civilian/military personnel had travel restrictions and I personally drove Mr. Foxx to the airport and wasn't sure that I could take and safely return to the base due to the travel limitations and my not being familiar with the downtown area.***

25. In you official capacity, were there ever any prohibited personnel practices, unfair and inequitable treatment, or discriminatory practices subjected to Mr. Foxx that were not subjected to other similar situated individuals? ***Yes – I could better understand (not approve) of what happened to Mr. Foxx,***

if he was new to the Federal service and serving a probationary period. However, he was a career employee (with veteran status) with 18 years of service and numerous prior awards and management gave him the most serious punishment possible. What happened to an Oral Admonishment, Official Reprimand, and 3-5 day suspension? Those kinds of penalties were given to other employees. How unfair does it have to be, before someone can take notice and do something about the inequities done to Mr. Foxx during his employment in Panama?

26. In your official capacity, should've Mr. Foxx been terminated in comparison to the other similarly situated individuals? ***No.***

27. Did Mr. C. Mike Birge (MWR) encounter misconduct while with the agency or interagency under the direction of the U.S. Southern Command? ***Yes.***

28. Was Mr. Birge terminated? ***No.***

29. Could Mr. Birge's treatment be considered different from Mr. Foxx? ***Yes.***

30. Did R.A. Kelly encounter misconduct with the agency or interagency under the direction of the U.S. Southern Command? ***Yes – He sold Government property for his own gain. Nothing happened to him while he was in Panama.***

31. Was he treated differently from Mr. Foxx? ***Yes – see above.***

32. Are you aware of any unfair practices that Mr. Charles Berg directed toward Mr. Foxx? ***Yes – Mr. Berg was management representative and made the decision to have Mr. Foxx removed from Federal service. Mr. Berg would not allow Mr. Foxx to complete the 30-day notice period prior to removal. Basically, he saw that Mr. Foxx was stripped of all entitlements.***

33. Are you aware of any unfair practices that Mr. William Wing directed toward Mr. Foxx? ***Yes – He refused to give Mr. Foxx his final pay and payment for annual leave and delayed numerous months before providing a fund citation so that Mr. Foxx's HHGs could be shipped to the states. I personally believe Mr. Wing's actions were directed by Charles Berg.***

34. In accordance with the rules, regulations, or law regarding official notice, did Mr. Foxx receive due process or adequate personnel management protection under the 30-day notice? ***No.***

35. Was Mr. Foxx promised a promotion/upgrade for reporting to Panama as part of his recruitment? ***According to Mr. Foxx, he was (I believe him) and his selection was during the time that there was turmoil and restrictions in Panama. My boss, the Civilian Personnel Officer left two days after I got there. Since Mr. Foxx was being considered for a job in Germany at the time, management probably promised him a promotion in order for him to commit.***

36. Did Mr. Foxx get the promised promotion/upgrade while in Panama? ***No.***

37. Did you ever check Mr. Foxx's personnel file? ***No – However, the Staffing Specialist for Navy did. As the Chief of the Branch I signed all personnel action and they were attached to the file. My review was to check remarks, accuracy of salary and the regulatory authority on the SF-50, Notification of Personnel Action prior to signing the SF-50.***

38. Did you ever see a transportation agreement with Mr. Foxx's name on it? ***No – That was the responsibility of the Staffing Specialist. Normally the transportation agreement is signed by the employee at their stateside base before they are given the travel orders. The signed agreement authorizes then use of Government funds. If by chance there wasn't an agreement in the file, the Staffing Specialist should have had Mr. Foxx sign another agreement.***

39. Did you personally ever destroy any information in Mr. Foxx's personnel file? ***No.***

40. When you did examine Mr. Foxx's personnel file, what did you see in it? ***N/A (see 37 above).***

41. Do you have knowledge of any other prohibited personnel practice that may have an affect upon the treatment of Mr. Foxx? ***There were numerous prohibited personnel practices committed by my former boss. That was the reason the AF IG Team was in Panama for 2 or 3 months. I don't believe those practices had any affect on the treatment of Mr. Foxx. Navy had its own agenda, and it seems unlikely that one man***

can stand alone and go up against Navy when the system doesn't seem to play fair.

42. In your official capacity and opinion, should Mr. Foxx be reinstated into Federal service? ***Yes – Knowing all the facts of the charge and the firing of Mr. Foxx, if I was the Staffing Specialist considering Mr. Foxx for reinstatement I would work very hard at trying to get him reinstated. He has been punished to the extreme when consider another individual was charged with the same offense and received a reprimand. Had Mr. Foxx not been fired he would be within a few years of meeting the 30-year period for retirement.***

43. When decisions were being made in reference to Mr. Foxx, Mr. Von Hollen and others, who were the individuals involved? ***F. Michael Bailey, Van Balzer, Charles Berg, Captain Comer, Commander Kelly, William Wing, the AF IG Team (I can't remember the names) however, they were in Panama approximately three months. I was there and met with the IG Team numerous times regarding Von Hollen and I met and talked to Bill Wing and Charles Berg, regarding George Foxx.***

44. Of the above named decision-makers, have any of the decision-makers been contacted by O.P.M. or E.P.A. investigators o your knowledge? ***I wouldn't know. Since they didn't contact me, who's to say who they contacted.***

45. Based on prohibited personnel practice, should Mr. Foxx have been fired in relations to other similar situated individuals who were not? ***No.***

46. Would you consider the actions by the Navy, agency, interagency or U.S. Southern Command as "promoting the efficiency of the service" via the termination action toward Mr. Foxx? ***No.***

47. In a comparative analysis, would you in your opinion consider an investigation or suitability determination by O.P.M. or E.P.A. to be valid, sound, or in good personnel management practice based on your official knowledge of the Navy, agency, interagency, or U.S. Southern Command treatment toward Mr. Foxx? ***Mr. Foxx was charged with travel fraud. Consideration was not given of his prior outstanding performance or his more than 15 years of Federal service. Regardless***

of how good Mr. Foxx's performance was prior to and during his employment in Panama he was fired due to a $27.00 error on a travel voucher. Mr. Von Hollen was charged with travel fraud too. To my knowledge he never attended training, he visited his family. If you took into consideration the cost of airfare, per diem, etc., it was much greater than $27.00. However, Mr. Von Hollen was not fired, he was given a reprimand. How can the treatment of Mr. Foxx be valid or good personnel management practice when another employee commits the same violation and more or less receives a slap on the wrist? For one it was okay and the other one's Federal career was ruined.

48. In a comparative analysis, would you consider the adverse actions taken by the agency, Navy, O.P.M. or E.P.A. "to be promoting the efficiency of the service" when omitting prohibited personnel practice including discrimination or disparity? *The disparity/discrimination is stated in 47 above. The efficiency of the service was for one employee and not for the other. Mr. Foxx lost his career and Mr. Von Hollen was reward for his wrongdoing. Von Hollen remained in Panama and to my understanding was promoted. O.P.M. did not*

contact me and as it stands now they won't even consider Mr. Foxx's suitability for reinstatement until December 11, 2001. How long must he be punished for a $27.00 error.

49. Your period of duty in the U.S. Southern Command was:

June 1989 to ***October 1991***

From To

DECLARATION

I HEREBY declare under the penalty of perjury and under the provisions of 28 U.S.C. Section 1746 that the foregoing is true and correct to the best of my knowledge.

/s/_____
ELSIE L. MILLS

Executed on this 3rd day of July, 2000.

Notary Public

DONNA K. SIMON, Notary Public
In and for the State of Ohio
My Commission Expires Dec. 1, 2003
Stamp or Seal

Dayton, Ohio

/s/_____
Donna K. Simon